

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of Marc Bessette,
d/b/a Bessette General Contractor

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 7, 2004, at 9:30 a.m. at the Office of Administrative Hearings, 100 Washington Avenue South, in Minneapolis. The hearing was held pursuant to a Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges dated October 17, 2003, and an Amended Statement of Charges dated February 17, 2004.

Michael J. Tostengard, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Commerce ("the Department"). There was no appearance by or on behalf of Respondent, Marc Bessette. The last known address of Respondent is 36072 Grove Street, Palisade, MN 56469. Based upon Respondent's failure to appear, the Department requested a Default Recommendation. The OAH record closed on April 7, 2004.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Commissioner of Commerce, 85 East Seventh Street, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision in this matter under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

The issues in this case are as follows:

1. Whether Respondent, by failing to make payment to Deerwood Cabinet & Lumber until the Department intervened, has been shown to be incompetent, untrustworthy, or financially irresponsible, in violation of Minn. Stat. § 326.91, subd. 1(6) (2002).
2. Whether Respondent's theft conviction demonstrates that he is untrustworthy in violation of Minn. Stat. § 326.91, subd. 1(6) (2002).
3. Whether Respondent's theft conviction demonstrates that he has engaged in a dishonest practice in violation of Minn. Stat. § 326.91, subd. 1(4) (2002).
4. Whether Respondent, by failing to complete the Ash project, has performed negligently or in breach of contract, in violation of Minn. Stat. § 326.91, subd. 1(4) (2002).
5. Whether Respondent, by failing to pay subcontractors on the Ash project, violated Minn. Stat. § 326.91, subd. 1(8) (2002).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges in this matter were served upon Respondent by U.S. mail on October 17, 2003, at 36072 Grove Street, Palisade, MN 56469.

2. The Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges served on Respondent contained the following instructional notice in bold-face type:

If Respondent fails to attend or otherwise appear at any prehearing conference, settlement conference, or hearing in this matter without the prior consent of the judge or fails to comply with any interlocutory order of the judge after having been served with a copy of this Order, Respondent shall be deemed in default and the allegations or issues set forth herein may be deemed proved, and Respondent may be censured and/or a civil penalty may be imposed against Respondent without further proceedings.

3. The prehearing conference was scheduled for December 11, 2003, at 1:30 p.m. at the Office of Administrative Hearings in Minneapolis. Mr. Tostengard appeared on behalf of the Department and Respondent appeared on his own behalf, without counsel. Administrative Law Judge Kathleen Sheehy presided over the prehearing conference and issued a Prehearing Order, setting dates by which the parties were to exchange exhibits and witness lists, and scheduling the hearing for January 22, 2004.

4. By letter dated January 13, 2004, Mr. Tostengard notified the Administrative Law Judge that the Department had recently learned that Respondent had been

charged with felony theft of certain construction tools in Aitkin County, Minnesota, and that Respondent was scheduled to go to trial on the charge on January 27, 2004. Mr. Tostengard requested that the hearing in this matter be rescheduled to allow the Department time to file an Amended Statement of Charges, if necessary.

5. By letter dated January 14, 2004, Respondent objected to a continuance of the hearing.

6. By letter dated January 16, 2004, Administrative Law Judge Barbara Neilson continued the hearing and scheduled a prehearing conference by telephone with the parties on January 22, 2004, for the purpose of discussing the status of the criminal matter and setting a new hearing date.

7. Both parties participated in the prehearing conference by telephone on January 22, 2004. During the conference, Respondent indicated that his trial in the criminal matter was scheduled to begin on January 28, 2004, and also stated that he was going to be working in Arizona for approximately six weeks. A new hearing date of April 7-8, 2004, was discussed with the parties and scheduled.

8. Following the prehearing conference call, the Administrative Law Judge issued a Second Prehearing Order. This Order gave the Department until February 18, 2004, to file an Amended Statement of Charges. It further gave the parties until March 31, 2004, to exchange exhibits and witness lists, and scheduled the hearing for April 7-8, 2004.

9. Respondent was found guilty of theft in the Aitkin County matter.

10. On February 18, 2004, the Department served an Amended Statement of Charges on Respondent by U.S. mail at Respondent's last known address.

11. By letter dated April 1, 2004, Mr. Tostengard informed the Administrative Law Judge that the Department had received correspondence from Respondent indicating that Respondent no longer desired to hold a Residential Building Contractor's License in the State of Minnesota. Mr. Tostengard stated that he forwarded to Respondent a Consent Order, but that, despite indicating that he would execute it, Respondent never returned it. Mr. Tostengard requested that the April 7, 2004, hearing date be converted to a telephone conference in order to discuss the Consent Order and to ascertain Respondent's intentions or, in the alternative, that the hearing proceed as scheduled.

12. In a letter dated April 2, 2004, the ALJ advised the parties that the hearing would commence on April 7, 2004, as scheduled, unless Respondent submitted a signed Consent Order by April 6, 2004.

13. Respondent did not submit the signed Consent Order by April 6, 2004. Respondent also did not appear at the hearing on April 7, 2004, or have an appearance made on his behalf.

14. Because Respondent failed to appear at the hearing in this matter, Respondent is in default. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference, Statement of

Charges and Amended Statement of Charges are hereby taken as true and incorporated into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Commerce and the Administrative Law Judge have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91 (2002).

2. The Department has given proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law and rule.

3. Respondent, having made no appearance at the April 7, 2004, hearing and not requesting any continuance or relief, is in default.

4. Pursuant to Minn. R. 1400.6000, a contested case hearing may be decided adversely to a party who defaults. On default, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference or other pleading, may be taken as true or deemed proved without further evidence.

5. By failing to make payment to Deerwood Cabinet & Lumber until the Department intervened, Respondent has been shown to be incompetent, untrustworthy, or financially irresponsible, in violation of Minn. Stat. § 326.91, subd. 1(6) (2002).

6. By virtue of his criminal conviction for theft, Respondent has been shown to be untrustworthy in violation of Minn. Stat. § 326.91, subd. 1(6), and to have engaged in a dishonest practice in violation of Minn. Stat. § 326.91, subd. 1(2) (2002).

7. By failing to complete the Ash project, Respondent has performed negligently or in breach of contract in violation of Minn. Stat. § 326.91, subd. 1(4) (2002).

8. By failing to pay subcontractors on the Ash project, Respondent has violated Minn. Stat. § 326.91, subd. 1(8) (2002).

9. Respondent is subject to discipline and civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6 and 7, and 326.91, subd. 1 (2002), and the imposition of sanctions is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take disciplinary action against Respondent and impose appropriate civil penalties.

Dated: April 23, 2004

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Default.

NOTICE OF AGENCY DECISION

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.